

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRACY JAHR, et. al.,

Plaintiffs,

V.

UNITED STATES OF AMERICA

Defendant.

No. C14-1884-MJP

**DECLARATION OF BRIAN C.
BROOK IN SUPPORT OF
PLAINTIFFS' MOTION TO MODIFY
SCHEDULING ORDER**

NOTED FOR CONSIDERATION:

Friday, August 12, 2016

I, Brian C. Brook, state and declare as follows:

1. I am an attorney licensed to practice law in the State of New York and the District of Columbia, among other jurisdictions, and am a partner in the law firm of Clinton Brook & Peed. I am counsel of record for Plaintiffs in the above-captioned case, have been admitted *pro hac vice* to practice before this Court in connection with it.

2. I submit this Declaration and the exhibits attached hereto in support of Plaintiffs' Motion to Modify had Scheduling Order.

The Previous Modifications to the Schedule Were Negotiated Based on Specific Representations and Assumptions

3. On February 17, 2016, Plaintiffs filed an Unopposed Motion to Extend Deadlines (the “First Motion”), seeking a six-month extension of all discovery deadlines. The

1 First Motion described the history of discovery up to that point, including the significant delays
 2 in the Government's production of documents, and I incorporate those facts stated into this
 3 Declaration. The Government filed a response on February 23 asserting that it "does not agree
 4 with Plaintiffs' characterization that the United States has delayed or impeded the discovery
 5 process in this case in any manner." ECF No. 18. However, the filing did not specifically
 6 identify any "characterization" language disputed by the government, nor did it contend that
 7 any facts had been misrepresented in Plaintiff's filing.

9 4. On March 8, 2016, the Court held a teleconference to discuss the First Motion. I
 10 appeared on behalf of Plaintiffs, while Assistant United States Attorney Kristin Johnson
 11 appeared on behalf of Defendant.

13 5. During the teleconference, the Court encouraged Plaintiffs and Defendant
 14 (together, the "Parties") to take steps toward reducing discovery costs and specifically
 15 authorized conducting remote depositions through federal courthouses.

16 6. In light of the fact that there were dozens of fact witnesses—indeed, 78 were
 17 listed on Defendant's own Rule 26(a)(1) disclosures—most of whom were active-duty military
 18 and stationed in dozens of different locations, I repeatedly had asked Ms. Johnson to consent to
 19 Plaintiffs conducting informal telephone interviews before noticing depositions. I pointed to
 20 the fact that the Advisory Committee on the Federal Rules of Civil Procedure encouraged such
 21 steps. Each time, Ms. Johnson said she was open to it, but failed to explicitly consent or refuse.
 22 Accordingly, I was sure to raise this idea during the March 8 teleconference. Although we
 23 have not purchased the transcript of this call, my recollection is that the Court supported this
 24 request and asked Ms. Johnson whether it could devise a protocol with the Army Judge
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1 Advocate General (“JAG”) assigned to the matter to conduct such interviews. According to my
 2 notes of the conference, Ms. Johnson replied that she had “no problem with that.”
 3

4 7. The Court instructed the Parties to confer about a revised schedule (including a
 5 deadline for the Defendant’s then-still-unfiled Rule 12(b)(1) motion), involve the Army JAG in
 6 doing so, and submit a revised schedule within ten days. ECF No. 20.

7 8. On March 11, 2016, the Government emailed a proposed schedule that provided
 8 for significantly less than the six-month extension requested in the unopposed First Motion. A
 9 six-month extension would have yielded a discovery end date of September 14, 2016.
 10 However, the Government proposed an end date of June 1, 2016.

11 9. The Parties had a conference call on March 14, 2016. I was on the call for
 12 Plaintiffs, along with my associate, Kari Parks, who had been working essentially full-time on
 13 the discovery in this case since she joined our firm in December 2015. Ms. Johnson was on the
 14 call for Defendant, and she represented that JAG Maj. David Krynicki was on the line, but he
 15 did not participate in the discussion, even when asked direct questions by me.

16 10. During the March 14 call, Ms. Johnson contradicted her prior representation to
 17 this Court. She stated unequivocally that the Government refused, and would continue to
 18 refuse, to let Plaintiffs’ counsel to interview potential witnesses by phone before noticing
 19 depositions. My notes reflect her verbatim statement to me: “You don’t just get to call around
 20 and interview numerous Army officials.”

21 11. During the March 14 call, I also expressed concern that neither Ms. Johnson nor
 22 anyone in the Army’s JAG office had talked to any fact witnesses to help Defendant fulfill its
 23 discovery obligations, including responses to both interrogatories and document requests. In
 24
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1 response, Ms. Johnson stated, "I am not aware of a rule that tells me who I have to talk to to
 2 respond to discovery requests."

3 12. Chief among the document discovery yet to be done by Defendant at that point
 4 was a search for responsive emails, which apparently had not previously been done despite the
 5 fact that the Federal Rules have been updated for the 21st century and Plaintiffs' May 2015
 6 document requests had explicitly requested emails. *See* First Motion, ECF No. 17, at 3-4.

7 13. During the March 14 call, the Parties negotiated the specifics of the discovery
 8 schedule per this Court's instruction. Plaintiffs reluctantly agreed to a shorter discovery
 9 schedule than the six-month extension they had requested from this Court in the First Motion.
 10 This agreement was reached based on Ms. Johnson's commitment to producing all outstanding
 11 document discovery by June 1, 2016. She explained that that was the date when Maj. Krynicki
 12 was leaving his current post and would not be available to provide any further assistance. Ms.
 13 Johnson told Plaintiffs that Maj. Krynicki's departure meant that any requests for email
 14 searches had to be given to the Government by May 1, 2016. I advised Ms. Johnson that
 15 Plaintiffs would provide lists of custodians and search terms but that, in our view, the
 16 Government still had an obligation to undertake some effort to determine appropriate
 17 custodians and search terms on its own—especially considering the Government's refusal to
 18 permit Plaintiffs to conduct informal interviews of its own. As explained below, because the
 19 Government has refused to provide us with information about the search efforts it actually
 20 performed, we do not know whether anyone did so. We do not even know whether the search
 21 terms that we sent were used.

22 14. Although Ms. Johnson committed to producing documents by June 1, I
 23 explained that we could not agree to that being the discovery end date. We needed to have the
 24

1 opportunity to review those documents before conducting remaining depositions. Moreover,
 2 we needed time to be able to propound additional discovery requests, including interrogatories,
 3 and to file discovery motions if need be, if the Government's production proved to be
 4 inadequate. Accordingly, Ms. Johnson consented to a schedule that afforded Plaintiffs more
 5 than 30 days to review the documents before the deadline to serve further requests or to file
 6 discovery motions.

8 15. Also during the March 14 call, I raised the issue of needing to make sure that
 9 there was time built into the schedule that would allow for Plaintiffs to conduct discovery after
 10 the decision is rendered on the Government's intended Rule 12(b)(1) motion, which was
 11 supposed to have been filed before discovery even began. To that end, Ms. Johnson agreed to
 12 an earlier deadline (April 1) for her to file that motion than she had requested (May 6).
 13 Without committing to anything specific, the Parties also discussed that discovery may need to
 14 be extended further if the Court was unable to rule on that motion within a couple months of
 15 briefing being completed.

16. 16. Ms. Johnson circulated a revised draft Stipulation and Proposed Order on the
 17 afternoon of March 14. I responded two hours later with my edits, including a request to make
 18 clear that Plaintiffs' agreement to this shorter schedule was premised on having the opportunity
 19 to conduct discovery after a ruling on the Rule 12(b)(1) motion. Ms. Johnson later objected to
 20 some of my changes:

21 I have reviewed it. There are two things I do not agree with.

- 22 1. The following statement needs to be removed. I do not agree with it. It may be your
 23 objective, but it is not mine:

24 One objective of the agreed-upon schedule is to afford the Plaintiffs
 25 opportunity to complete discovery in this matter after the Court rules
 26 on the Defendant's anticipated Rule 12(b)(1) motion. To the extent
 27 necessary based on the timing and content of the Court's decision, the

1 Plaintiffs may request a further extension of time to complete
2 discovery.

3 You can leave the last sentence, so long as you include a statement that defendants
4 reserve the right to oppose any such motion.

- 5 2. The deadline for 12(b)(1) motions should apply to both Parties.

6 Ex. 4. I agreed to Ms. Johnson's first requested change and filed the proposed schedule, which
7 included a discovery motions deadline of July 8, 2016. *See* ECF No. 21.

8 17. On March 21, 2016, this Court entered a revised schedule, adopting the various
9 discovery deadlines proposed by the Parties after negotiation, but setting a trial date for
10 February 2017 rather than December 2016, as had been proposed by the Parties in view of the
11 discovery deadlines. ECF No. 22.

12 **The Government Failed to Produce Remaining Documents on
13 Time, Due in Part to Technical Problems**

14 18. Based on Ms. Johnson's representations about having a limited timeframe for
15 emails to be reviewed and produced, Plaintiffs quickly sent Ms. Johnson and Maj. Krynicki a
16 list of initial custodians and proposed search terms that was tailored to that group of custodians
17 on March 18, 2016. In that same correspondence, I reiterated our position that the Government
18 still had an obligation to identify other custodians and search terms, among other things. I also
19 conveyed Plaintiffs' request that Defendant follow procedures in the document review and
20 production that are, in our experience, standard practice:

- 21 1. Produce entire email chains that turn up with search terms, not just individual
22 messages
- 23 2. Identify where the emails were stored, how they were retained, how they were
24 retrieved, and who had access to be able to delete emails, and when that access was
25 available
- 26 3. Any documents that come up on these search terms and are potentially responsive,
27 but which are withheld on any basis (privilege, classified, etc.) must be logged

1 4. If you are unable to retrieve any emails for a custodian during the relevant time
2 frame, state the reason(s) why.

3 Ex. 5.

4 19. Although it is customary to confer about such proposals, the Government did
5 not respond to my March 18 email or attachment. We assumed that this was because Ms.
6 Johnson was focused on her Rule 12(b)(1) motion, and soon after receiving that on April 1, our
7 attention turned to that as well.

8 20. On April 18, 2016, the Government produced additional documents to Plaintiffs.
9 This included 24 pages of emails, all from 2013—two years after the events at issue in this
10 case. Those emails appeared to be scans of hardcopy printed emails.

12 21. Despite the absence of any feedback from the Government regarding our March
13 18 submission, we adhered to Ms. Johnson's deadline of May 1 for the submission of email
14 search requests. We were encouraged by the absence of any objections to our prior suggestions
15 and procedure specifications, and therefore adhered to that same model. Accordingly, my
16 partner on this matter, Matthew Peed, sent a list of additional custodians, and the tailored
17 search terms we proposed to be used with them, via email on May 1, 2016. Ex. 6.

19 22. The next set of documents Defendant produced was sent on May 24, 2016. This
20 included email files for custodians identified by Plaintiffs in my March 18 correspondence. I
21 was on vacation at the time, but Ms. Parks began processing and reviewing the materials
22 received. Promptly after my return on June 2, 2016, I examined the materials myself, and
23 identified serious production errors.

25 23. On June 3, 2016, I emailed Ms. Johnson to inform her of the most obvious
26 problem: the emails were uniformly truncated after the first hundred words or so, and all
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28

1 attachments were missing. Ex. 7. Ms. Johnson advised that she would look into it on her end.

2 *Id.*

3 24. As reflected in the series of emails attached to this Declaration, it took ten days
4 of back-and-forth before the Government conceded there was a production problem and that a
5 complete replacement production was needed. *Id.*

6 25. Throughout this process, we have been patient with the Government and its
7 technological difficulties. We also have taken into consideration Defendant's losses of
8 important personnel, including Maj. Krynicki, as well as the U.S.A.O. paralegal who had been
9 assigned to this case.

10 26. Based on the understanding that the Government took responsibility for its
11 document production errors and intended to consent to extensions of the discovery deadlines,
12 Plaintiffs have awaited some kind of an indication from the Government as to a firm date by
13 which the email document production would be corrected and completed. In my view, it was
14 reasonable not to commit to a specific revised schedule *before* having a clear understanding of
15 the Government's problems and a reasonable basis to believe that they were fixed.

16 27. Nonetheless, as the current discovery deadline got closer, I grew increasingly
17 concerned about the absence of progress being made by the Government. I sent a series of
18 emails to Ms. Johnson on the schedule and production issues, and attempted to speak with her
19 by phone on July 8—the discovery motions deadline—only to get her voicemail. Finally, on
20 July 18, 2016, I simply proposed a schedule based on Ms. Johnson's representation about when
21 we would receive the email production.

1 28. After she failed to reply, I sent a follow-up on July 19, 2016: "Kristin, Please let
 2 me know whether this proposed schedule works for you, or if you'd rather wait a few more
 3 days to see if you get the Army's documents as promised."

4 29. Ms. Johnson finally responded on the afternoon of July 20, informing us that the
 5 USAO had finally received emails from the Army, but that they were "still sorting through it
 6 trying to make heads or tails out of it." Despite these remarks—which strongly suggested to us
 7 that the email production would be far from helpful to resolving outstanding issues—Ms.
 8 Johnson said that she was "not inclined" to extend either the discovery motions deadline or to
 9 permit any discovery besides three depositions.

10 30. Despite feeling ambushed at this response to our trust that the Government's
 11 email production was delayed in good faith, I responded that same day to ask Ms. Johnson to
 12 reconsider her position. I laid out the reasons why she should do so in detail. I realized that
 13 she had many cases and may not have remembered the circumstances of this one. Among other
 14 things, I reminded Ms. Johnson that we were in this position because of the Government's
 15 delays, which were still not rectified.

16 31. After receiving no response to my July 20 email, Ms. Parks and I called Ms.
 17 Johnson on July 21 and once again got her voicemail. We left a message and I followed up
 18 with an email asking to speak with her about whether she would reconsider her position or if
 19 we needed to file a motion.

20 32. Ms. Johnson did not return our call, but she replied to my email asking to speak
 21 with her at 1:06 AM Eastern time on July 22, advising that she was unavailable before Monday
 22 July 25. She indicated openness to changing her position by saying "let's do a 26f conference
 23 on Monday and figure this out."

1 33. During a July 25, 2016 teleconference with Mr. Peed, Ms. Parks, and me for
 2 Plaintiffs, Ms. Johnson stated unequivocally that she would not reconsider her position on
 3 discovery deadlines, and that she would still only agree to allow three depositions to occur.
 4 Out of concern that Ms. Johnson had not read my email explaining why that position was
 5 unreasonable, I reiterated the points I had made in an effort to try to avoid burdening this Court
 6 with this dispute.

8 34. During the July 25 call, I also asked Ms. Johnson—once again—when Plaintiffs
 9 could expect to receive the emails Ms. Johnson had long been promising to produce. Ms.
 10 Johnson responded that she did not know because “they’re still transferring them all to PDFs,
 11 so . . .” I pressed for a firmer answer about when Plaintiffs should anticipate the emails, to
 12 which she replied, “No idea. They’re transferring the format.” Ms. Johnson also informed
 13 us—for the first time—that apparently large quantities of emails had been deleted. I explained
 14 that we need to understand what has been deleted, and when. I asked if Ms. Johnson would
 15 provide that information voluntarily, as we had long ago requested (and to which she had never
 16 objected). Ms. Johnson refused to do so without a formal discovery request tailored to that,
 17 even though she had proposed the informal process that Plaintiffs proceeded under in their
 18 March 18 and May 1 correspondence. I again explained that this was why we needed other
 19 discovery deadlines extended, and Ms. Johnson did not budge. Ms. Johnson’s position was
 20 firm: she would not provide any such information regarding the preservation, collection, and
 21 production of documents unless the Court orders an extension of discovery that allows
 22 Plaintiffs to propound more formal discovery requests.

23 35. On July 27, 2016, Plaintiffs received the first set of re-processed emails from the
 24 Government. Only one of the custodians from my March 18 correspondence was included in
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this production, however, and even as to him there are still numerous missing attachments, and other pages that have been improperly processed and are unreadable, including large images so compressed onto a single page that they are illegible. Furthermore, the Government did not format the production to be searchable, despite Plaintiffs' request to the contrary.

36. As of this date, the Government has still not committed to a deadline for completing its production, which was supposed to have been completed by June 1, 2016.

37. The Government has not remediated numerous other deficiencies identified by Plaintiffs prior to the last discovery extension.

Exhibits Attached to this Declaration

38. Attached as Plaintiffs' Exhibit 1 is a true and correct copy of a Letter from Brian Brook to Kristin Johnson dated February 1, 2016.

39. Attached as Plaintiffs' Exhibit 2 is a true and correct copy of an Email from Brian Brook to Kristin Johnson dated February 16, 2016.

40. Attached as Plaintiffs' Exhibit 3 is a true and correct copy of an Email from Beth Johnson to Brian Brook dated March 11, 2016.

41. Attached as Plaintiffs' Exhibit 4 is a true and correct copy of Emails between the Parties regarding the draft stipulation, dated March 14, 2016 through March 17, 2016.

42. Attached as Plaintiffs' Exhibit 5 is a true and correct copy of an Email from Brian Brook to Kristin Johnson dated March 18, 2016.

43. Attached as Plaintiffs' Exhibit 6 is a true and correct copy of an Email from Matthew Peed to Kristin Johnson dated May 1, 2016.

44. Attached as Plaintiffs' Exhibit 7 is a true and correct copy of Emails between the Parties regarding truncated emails, dated from June 3, 2016 through June 10, 2016.

1 45. Attached as Plaintiffs' Exhibit 8 is a true and correct copy of Emails between the
2 Parties regarding technical production problems, dated from June 3, 2016 through June 13,
3 2016.

4 46. Attached as Plaintiffs' Exhibit 9 is a true and correct copy of Emails between the
5 Parties regarding production of emails, dated from June 22, 2016 through July 12, 2016.

6 47. Attached as Plaintiffs' Exhibit 10 is a true and correct copy of Emails between
7 the Parties regarding modifying discovery deadlines, dated from July 18, 2016 through July 22,
8 2016.

9 I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is
10 true and correct. I am aware that if they are willfully false, I am subject to punishment.

11 Dated: New York, New York
12 July 28, 2016

13 /s/ Brian C. Brook

14 Brian C. Brook